No. 323.

Supreme Court of the United States

OCTOBER TERM, 1912.

~~No. 149.~~

THE CITY OF SAULT STE. MARIE, ANDREW J. SHORT, MAYOR, ET AL.,
Appellants,

vs.

INTERNATIONAL TRANSIT COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR APPELLEE.

HENRY E. BODMAN,
Attorney for Appellee.

ALEXIS C. ANGELL,
HERBERT E. BOYNTON,
JAMES TURNER,
Of Counsel.

DETROIT:
Record Printing Co., Free Press Bldg., 11-17 Lafayette Boulevard
1914.

INDEX OF CASES

INDEX OF SUBJECTS.

Supreme Court of the United States

OCTOBER TERM, 1912. No. 749.

THE CITY OF SAULT STE. MARIE, ANDREW J. SHORT, MAYOR, ET AL., *Appellants*, vs. INTERNATIONAL TRANSIT COMPANY, *Appellee*.	*Appeal from the District Court of the United States for the Western District of Michigan.*

BRIEF FOR APPELLEE

Statement of Facts

The Statement of Facts in appellant's brief, while in the main correct, is not complete.

The appellee is a corporation organized under the laws of the Province of Ontario. Its original Letters Patent were issued in 1901. By Supplementary Letters Patent, issued in 1902, this corporation was authorized to acquire, construct, own, maintain, charter and navigate steam and other vessels.

To this company there was issued, on the 27th of April, 1906, in the name of the King of Great Britain, etc., a license to operate the ferry in question. This license emanated from the Dominion of Canada, and provided that:

> "We do by these presents give and grant unto The International Transit Company, of Sault Ste. Marie, in the Province of Ontario, hereinafter called the licensee, its successors and assigns, exclusive right and privilege of operating our ferry across the St. Mary's River, between Sault Ste. Marie, in Algoma, in the Province of Ontario, and Sault Ste. Marie, in the State of Michigan, in the United States of America."

This license was to continue for ten years from May 1, 1906, upon a yearly rental of $100, to be paid by the licensee. The license was granted upon certain express conditions incorporated therein, among which were certain requirements as to when the ferry should commence to operate each year and when it might discontinue, how frequently the ferry should cross the river, and what fares and tolls were to be charged. The license contained a schedule of rates and fares covering the transportation of pedestrians, vehicles, baggage and other articles, horses, cattle, sheep, etc.

This license also provides that the Governor in Council shall be at liberty to alter and modify the tariff of charges and tolls should it be deemed expedient in the public interest, and, after notification to the licensee, *no other or larger fares or tolls shall be imposed*. The Governor in Council is also

at liberty at any time to declare the license forfeited when it appears that the licensee has failed to perform or fulfill any of the provisos, restrictions and conditions continued therein. The license also contains a provision requiring observance of the laws of the United States or of the State of Michigan or of the Town of Sault Ste. Marie, in reference to ferriage which may be applicable to said ferry, or such portion thereof as may be within the jurisdiction of any of them. (This license is set forth on pages 66-68 of the Record.)

Under the authority of this license, the appellee established, and has ever since operated, its ferry. In doing this, it occupies no public property upon the American side of the river, but makes use of a private wharf and approach thereto which it has obtained under lease from a private owner.

The Transit Company, as above stated, is a Canadian company, with its headquarters at the City of Sault Ste. Marie, Ontario. It has a dock and warehouse on each side of the river. A statement is made in appellant's brief on page 5, that "All fares are collected on the Michigan side at its ticket office before passengers are permitted to go on board the ferry boats." This is true as to passengers traveling from the American to the Canadian side of the river. The Transit Company has also a ticket office and warehouse on the Canadian side. All moneys are deposited in the Bank of Montreal, Sault Ste. Marie, Ontario. It is true that the person at the present time acting as superintendent of the ferry business

resides at Sault Ste. Marie, Michigan, but the headquarters of the Transit Company are located in the Dominion of Canada, and its funds are deposited there. The two steam vessels owned and operated by it are of British registry and have their situs in the Dominion of Canada, and outside of the property in the City of Sault Ste. Marie, Michigan, which it leases, the property of the company has its situs in Canada.

The impression might be derived from appellant's brief that this ferry and the steamers engaged therein are small and insignificant. The Transit Company owns and operates, in connection with this ferry, two steamers—one steel steamer of 254 gross tons and licensed to carry 531 passengers, and one wooden steamer of 156 gross tons licensed to carry 500 passengers. Each steamer has a certificate of British registry, and each is authorized to run upon the waters between Point Iroquois, Lake Superior and Bruce Mines, situated on the north channel of Lake Huron. These steamers are not merely ferries in the technical sense of the word, as used in *St. Clair County vs. Interstate Transfer Company*, 192 U. S., 454 (p. 467):

> "In a strict sense, the ferry business is confined to the transportation of persons, with or without their property, and a ferryman carrying on only a ferry business is bound to transport in no other way."

The appellee does not confine itself to the transportation of persons, with or without their property. On the contrary, during the years 1910-1911, property

was shipped on regular bills of lading, issued precisely as a railroad carrier would issue them, as follows:

> In 1910 there were 1,282 such shipments, aggregating 1,153,194 lbs. in weight.
>
> In 1911 there were 1,591 such shipments, aggregating 1,630,832 lbs. in weight.

(Rec., p. 52. To be read in connection with insert marked "Errata, on page 52.")

On September 30, 1911, an ordinance was adopted and given effect by the City of Sault Ste. Marie, Michigan (Rec., pp. 17-19). This ordinance forbids any person or company to operate a ferry boat, or engage in the business of carrying persons or property from the City of Sault Ste. Marie, Michigan, to the Canadian shore without first obtaining a license from the Mayor, and otherwise complying with the terms of the ordinance. The essential features of this ordinance are as follows:

> (a) The Mayor is "empowered and authorized" *but not required* to issue a license for the operation of a ferry across the St. Mary's River to the Canadian shore, upon the payment to the City Treasurer of the sum of $50 per year for each boat so engaged.
>
> (b) Before any license shall be granted, a written application must be made, setting forth the "schedule of rates of ferriage of persons and property proposed to be charged by the applicant *within the territory prescribed by section two (2) of this ordinance.*" (Section 2 of the

ordinance authorizes the issuance of licenses for the transportation of persons and property from the City of Sault Ste. Marie, Michigan, across the St. Mary's River to the opposite shore. The schedule of rates to be charged "within this territory" probably refers to rates of ferriage both ways within this territory.)

(c) No license shall be issued unless the rates of ferriage set forth in the application conform to the schedule set forth in the ordinance itself.

(d) Any licensee failing to conduct his business of ferrying in accordance with the terms and provisions of the ordinance and application for license, shall be deemed to have forfeited his rights to operate said ferry, and shall be subject to the penalties prescribed by the ordinance.

(e) The ordinance specifies minutely the season, frequency and hours of service and rates to be charged for the several classes of transportation.

In all these particulars the conditions imposed by this ordinance are different from those prescribed by the Canadian license under which appellee is operating.

The ordinance also provides:

"*Sec.* 8. The Mayor is hereby authorized to revoke the license granted to any person, persons or company under this ordinance *whenever he shall be satisfied* that such person, persons or company has intentionally violated any of

> the provisions of this ordinance, such revocation to take effect upon written notice from the Mayor to such licensee that said license has been revoked; and any operation of such ferry or ferries within the city limits, after such notice to such licensee, shall be deemed a violation of this ordinance."

No hearing is provided in order to determine whether or not such violation has taken place.

After the passage of this ordinance the Transit Company found itself in the following predicament: It had accepted a license from the Dominion of Canada and had established its ferry under the authority thereof, and was operating its steamers in accordance with its terms. A departure from those terms and conditions rendered this license subject to forfeiture. On the other hand, the City of Sault Ste. Marie, Michigan, had forbidden it to operate its steamers from the American to the Canadian shore without applying for a license and agreeing to conditions imposed by an ordinance of that city differing in its essential features from the terms of the license already accepted. If it continued to operate its steamers without complying with the local ordinance, it was subject to fine and its officers and employees liable to imprisonment.

Shortly after the adoption of the ordinance in question, a captain of one of the Transit Company's steamers was arrested, charged with operating a ferry without a license. He was tried before a Justice of the Peace, convicted and sentenced to pay a fine of $50 and costs, and, on default thereof, to

be imprisoned in the jail of Chippewa County for a period of thirty days.

Points

1. The appellee is engaged in foreign commerce.

2. Such commerce is not subject to be regulated by the local ordinance in question, because this ordinance interferes with and burdens such foreign commerce, and therefore is in conflict with the commerce clause of the Federal Constitution.

3. The ordinance in question violates the treaty between Great Britain and the United States ratified in 1910, whereby it was agreed that boundary waters, including the St. Mary's River, should be free and open for the purposes of commerce to the inhabitants and the ships, vessels and boats of both countries equally.

Argument

If the ordinance in question can be construed as applying only to such persons as may desire to set up a ferry having its situs in the City of Sault Ste. Marie, Michigan, and desiring to operate under a license to be issued by that municipality, and not as applying to ferries which are created and established under the authority of the Dominion of Canada and

having their situs in Canada, it may be that such ordinance can be upheld. There is some ground for this view to be found in the second section of the ordinance, wherein the Mayor is authorized to grant a license to any persons "to keep, maintain and operate a ferry" for transporting persons and property from the City of Sault Ste. Marie, Michigan, across the St. Mary's River to the opposite shore. This language may mean merely that any person desiring to set up a ferry on the American side of the river for the purpose of transporting persons and property to Canada must apply for a license. As thus construed, the ordinance would purport to regulate only ferries established in the City of Sault Ste. Marie, Michigan—that is, having their situs or base there; and such construction would not interfere with a ferry established under the authority of the Canadian government, having its base or situs in Canada and operating under a license issued by the Dominion government. If the ordinance is given this effect, it might be sustained as a proper exercise of power, but as thus construed, it would not be applicable to the International Transit Company. If possible the ordinance should be so construed as to be given effect. If it cannot be thus construed, it is void: at least so far as the appellee is concerned.

The Appellee Is Engaged in Foreign Commerce

This Court has had occasion within recent years so frequently to define the term "commerce" that it would serve no purpose to review these definitions.

Very recently it was said:

> "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on."
>
> *Minnesota Rate Cases*, 230 *U. S.*, p. 399.

Were it not for language used in three decisions of this Court (referred to later), we venture the assertion that no one would question that transportation of persons and of property shipped on bills of lading, by ferry, is *commerce* within the meaning of the Federal Constitution. The entire argument to the contrary finds its ultimate support in these three decisions. Before discussing them, let us consider some of the rulings of this Court which may have an important bearing.

> "Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange

of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

County of Mobile vs. Kimball, 102 *U. S.*, 691 (702).

In *Hall vs. DeCuir*, 95 *U. S.*, 485, transportation of passengers alone was declared to be commerce, and laws regulating carriage of passengers from one State to another were held to be beyond the power of a State.

The commercial power of Congress extends to regulation of boats used as ferries and has been exercised in providing for the inspection of ferry boats.

U. S. R. S., 4426, 4464.

The Hazel Kirke, 25 *Fed.*, 601.

In *Gloucester Ferry Case*, 114 U. S., 196, the Court, in speaking of that commerce which is subject to the exclusive control of the Federal government, said:

"It matters not that the transportation is made in ferry boats, which pass between the States every hour of the day. The means of transportation of persons and freight between

> the States does not change the character of the business as one of commerce nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. * * * And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

In *Covington Bridge Co. vs. Kentucky,* 154 U. S., 204, the right of a State to fix charges for transportation over an interstate bridge was considered. This question involved two others, viz.:

> "First, whether such traffic across the river is interstate commerce; and, second, whether a bridge is an instrument of such commerce."

The Court held that traffic over this bridge was interstate commerce, and said:

"While the reasons which influenced this Court to hold in the *Wabash Case* that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two States, it is impossible for either to fix a tariff of charges.

With reference to the *second* question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons vs. Ogden*, 9 *Wheat.* 1, 189, to be 'intercourse,' and the thousands of people who daily pass and re-pass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier."

The *Covington Bridge Case* is referred to and quoted from in the *Lottery Case*, 188 U. S., 321 (p. 352), as holding definitely that the doctrine in the *Gloucester Ferry* case and the *Wabash* case

(118 U. S., 557) had been expressly reaffirmed, and as definitely deciding that transportation by bridge or ferry was commerce and within the exclusive control of Congress.

In the *Lottery Case* the following excerpt from the opinion in the *Covington* case was quoted with approval:

> "While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, *or the charges upon a ferry a tax upon the commerce across a river.*"

That under the authority of the commerce clause Congress has legislated so as to include transportation by ferry is stated in a recent opinion by Mr. Chief Justice White, who said, referring to the Employers' Liability Act:

> "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, *ferries*, bridge, wagon lines, carriages, trolley lines, etc."
>
> *Employers' Liability Cases*, 207 *U. S.*, 463 (497).

In the *Henderson Bridge Case*, 166 U. S., 150, a tax on the value of a bridge franchise across the Ohio River, fixed on the basis of gross earnings, was sustained not as a tax on the business of interstate

commerce, but on the franchise granted by the State, as being intangible property situated within the State. Even this indirect approach to regulation of interstate commerce did not meet the approval of the entire court. Mr. Justice White, with the concurrence of three other justices, filed a dissenting opinion, holding that the *Gloucester Ferry* and *Covington Bridge* cases precluded such a tax, saying:

> "I consider it a new and startling doctrine to say that a bridge which is situated in two States, with the sanction of the laws of both, which has been made a post route by act of Congress, is not an instrument of interstate commerce, and that the traffic which goes over such bridge is not such commerce, and that the receipts derived from or charges resulting from such business are not receipts derived from interstate commerce business. Pushed to its legitimate conclusion, this premise deprives the interstate commerce clause of the Constitution of its entire efficacy, and is, I think, in direct conflict with the Constitution as interpreted by this Court from the foundation of the government."

In *New York Central R. Co. vs. Hudson County* 227 U. S. 248, it was held that railroad ferries were not subject to local State regulation because Congress had already given the Interstate Commerce Commission jurisdiction over them. The traffic passing over these ferries was thus recognized as commerce by Congress, and this Court as well.

The commerce in which appellee is engaged is not subject to regulation by the ordinance in question because such ordinance is a burden upon it and conflicts with the federal constitution.

It is insisted that the ordinance in question relates to matters of local concern which, although within the control of Congress are yet subject to State regulation so long as Congress has not taken action. We think this contention is sufficiently answered by the following extracts from decisions of this Court:

> "If a State enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation" (p. 396).
>
> *The Minnesota Rate Cases*, 230 *U. S.*, 352.

> "It has, indeed, often been argued, and sometimes intimated, by the Court that, so far as Congress has not legislated on the subject, the States may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal legislature by the same words. And certainly it has never yet been decided by this Court that the power to regulate interstate as well as foreign commerce, is not exclusively in Congress."
>
> *Case of State Freight Tax*, 15 *Wall.* 232 (279).

"A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation."

Henderson vs. Mayor of New York, 92 *U. S.*, 259 (272, 273).

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce."

"There is here and there a suggestion that the State not having granted such right, the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from State interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the

Courts to contentions like those made in the case at bar."

Oklahoma vs. Kansas National Gas Co., 221 *U. S.* 229, (pp. 260, 261, 262).

"The police power of the State cannot draw within its jurisdiction objects which lie beyond it. * * * On the subject of foreign commerce, including the transportation of passengers, Congress have adopted such regulations as they deemed proper, taking into view our relations with other countries. And this covers the whole ground. The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the act is therefore void."

Passenger Cases, 7 *How.* 283 (408-409).

Even if such regulations could be sustained on the ground that Congress has not acted, in relation to commerce between the States, it would not necessarily follow that foreign commerce could be similarly burdened by local authority. A distinction is drawn in this regard between interstate and foreign commerce in *Bowman vs. Chicago & N. W. Ry. Co.*, 125 *U. S.*, 465, where the Court said (pp. 482-3):

"It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are

> general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. *Henderson vs. Mayor of New York*, 92 *U. S.* 259, 273.
>
> The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Cinstitution which confers upon it power to regulate commerce with foreign nations. * * * And yet in respect to commerce among the States, it may be for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations."

Four cases are mainly relied on to support the argument that ferries are matters for State control, viz:

Gibbons vs. Ogden, 9 *Wheat.*, 1.
Conway vs. Taylor, 1 *Black*, 603.
Fanning vs. Gregoire, 16 *How.*, 524.
Wiggins Ferry Co. vs. East St. Louis, 107 *U. S.*, 365.

Conway vs. Taylor and *Fanning vs. Gregoire* were not followed in the *Gloucester Ferry* case nor the *Covington Bridge* case; Mr. Justice Field stating (in the *Gloucester* case, 114 U. S., p. 215) that they were decided *upon a mistaken construction given to*

the language of Chief Justice Marshall in Gibbons vs. Ogden, where it was said that "laws respecting ferries as well as inspection laws," etc., were matters for State control. Mr. Justice Field was of opinion that the court was plainly referring to *intrastate ferries* (114 U. S., pp. 215-216).

Gibbons vs. Ogden. An examination of the arguments in this case shed an important light upon this question, and show clearly that Chief Justice Marshall was *not* referring to *interstate* ferries.

Marshall is said to have followed closely the argument of Webster in saying that laws respecting ferries were regulations of police rather than of commerce in the constitutional understanding of that term. After an examination of these arguments, we submit that Webster was not referring to interstate ferries. The following is the basis for this suggestion:

First. Mr. Emmett, in citing the State laws affecting interstate stage-lines, ferries, etc., was contending, not that ferry regulations were matters of local commerce, but that *transportation of passengers* (*e. g.*, on stage-lines, steamboats, and ferries) *was not commerce at all.*

He maintained that:

> "Neither does the case present any ground on which the application of the clause (of the Federal Constitution) respecting commerce can be made; the vessels *not having been engaged in*

trade or commerce, but in carrying passengers for hire" (pp. 84-85).

* * * "the power of Congress could only be extended to fair cases of trading, * * * and not to the mere transportation of passengers * * * This distinction is in itself, of great consequence, and peculiarly applicable to the case before the court, in which the complainant states and the defendant admits the *vessels to have been employed in the transportation of passengers*" (9 Wheaton, p. 89).

"It could not, I think, be seriously contended that Congress can regulate the carrying of passengers from any part of the Union who are traveling to Ballston, Saratoga, or any other place for health or pleasure. * * * That falls within the sphere of State legislation."

(Note here that Mr. Emmett was not arguing that transportation by *ferries* constituted an exception to the rule that Congress was to regulate interstate commerce, but that interstate passenger traffic was not commerce.)

Mr. Emmett continued:

"Those who contend that navigating by steamboats between different States falls within the powers of Congress, must admit that it would have the power to prohibit the carrying of goods, wares, and merchandise in a steamboat from any foreign place or different State to another. Now, would Congress have power to prohibit the carrying of passengers in steamboats from Norfolk or Elizabethtown to New York? Certainly such power could not be contended for; and why not? *Only because the powers of Congress have nothing to do with the carrying of passengers.*" (Pages 95-96.)

After some further argument along this line, Mr. Emmett said:

> "The States have always legislated on a different principle, whether the conveyance of passengers was to be by land or by water. Every State has probably made numerous provisions on this subject;"

and he then cited the State laws respecting stage coaches and ferries (p. 97).

His contention was that "commerce" meant trade, the exchange and transportation of commodities, etc., and as proof of this he cited the State laws referred to as showing the practical construction of the term "commerce" *not to include passenger transportation.*

Mr. Emmett, in citing these State laws, was not, therefore, contending that ferry regulations were matters of internal commerce or local police over which Congress had no power, but that *passenger traffic was not commerce at all*, and that therefore Congress had no jurisdiction as to such traffic, interstate or otherwise.

Second. Mr. Oakley, on the other hand, contended (pp. 64-65) that the power to regulate commerce was concurrent, and in support referred to the enactment of State laws affecting *the internal trade* of the States, *including turnpike roads, toll bridges, stage wagons, ferries over navigable rivers and lakes.* He was referring to the *internal* commerce of a State, which, in the same paragraph, he thus defines:

> "Internal commerce must be that which is

> wholly carried on within the limits of a State, as where the commencement, progress, and termination of the voyage are wholly confined to the territory of the State."
>
> "All such laws," continued Mr. Oakley (*i. e.*, affecting roads, bridges, ferries, etc., wholly within a State), "must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State. But although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power *does not reach the regulation of internal trade*," etc.

It is clear that Mr. Oakley was referring to internal trade as defined by him, that is, purely intrastate, and to ferries and bridges that were intrastate.

A comparison of this argument with Webster's will show that it was *to this argument* that Webster replied as follows:

> "The argument alleges, that the States have a concurrent power with Congress, of regulating commerce; and its proof of this position is, that the States have, without any question of their right, passed acts respecting turnpike roads, toll bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the State itself, but also commerce between different States. Therefore, as all these are *commercial regulations*, and are yet acknowledged to be rightfully established by the States, it follows, as is supposed, that the States must have a concurrent power to regulate commerce.
>
> "Now, what was the inevitable consequence

of this mode of reasoning? Does it not admit the power of Congress, at once, upon all these minor objects of legislation? If all these be regulations of commerce, within the meaning of the Constitution, then, certainly, Congress having a concurrent power to regulate commerce, *may establish ferries, turnpikes, bridges, etc., and provide for all this detail of interior legislation.* To sustain the interference of the State, in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress, over a vast scope of *internal legislation, which no one has heretofore supposed to be within its powers.*" (Webster was here certainly referring to legislation upon purely intrastate subjects.) "But this is not all; for it is admitted, that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and, therefore, the consequences would seem to follow, from the argument, that all State legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; a consequence which no one would admit for a moment. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term. A road, indeed, might be a matter of great commercial concern. In many cases it is so; and when it is so, he thought there was no doubt of the power of Congress to make it. But generally speaking, roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed *commercial regulations.*"

Chief Justice Marshall followed the same idea in his opinion:

> "It is not intended to say that these words (commerce among the several States) comprehend that commerce *which is completely internal,* which is carried on between man and man in a State, * * * and which does not extend to other States" (p. 194). "The completely internal commerce of a State, then, may be considered as reserved for the State itself" (p. 95) (implying that commerce not *completely internal* had not been reserved).
>
> "They" (inspection laws) "form a portion of that immense mass of legislation which embraces everything *within the territory of a State* not surrendered to the General Government. * * * Inspection laws, quarantine laws, health laws, of every description, as well as laws for regulating *the internal commerce of a State* and those which respect turnpike roads, ferries, &c., are component parts of this mass."

Clearly, Chief Justice Marshall was referring to subjects that concerned the purely internal commerce of a State—as previously defined by him.

Third. As further proof that *Gibbons vs. Ogden* did not concede control of interstate ferries to the States, attention is called to the fact that the State law in that case was stricken down *in face of the argument that Livingston and Fulton's license was merely an interstate ferry license.*

> "Is it" (respondent's license) "in truth anything more than *an exclusive right of ferry over the waters of Hudson's River?*" (Argument of Mr. Oakley, p. 75.)

We submit, therefore, that Mr. Justice Field in the Gloucester Ferry case and Mr. Justice Brown in the Covington case were not mistaken in their construction of *Gibbons vs. Ogden*, and the numerous cases decided by this court on their authority have not all proceeded upon a fundamental misconception of what was there decided.

Fanning vs. Gregoire, 16 *How.* 524, contains the statement:

> "The argument that the free navigation of the Mississippi River, guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with the police power of the States *in granting* ferry licences. When navigable rivers within the commercial power of the Union may be obstructed, one or both of these powers may be invoked."

This statement was in no way material to the decision of the case. The suit was brought by a ferry owner, claiming an exclusive license from the State, to enjoin the operation of a ferry under a city license. As the State license was held to be not exclusive in its terms, there was no occasion to consider the validity of either of the licenses.

Conway vs. Taylor, 1 *Black*, 603, affirms the right of a State to grant licenses for interstate ferries. On examination of the opinion, however, it will be found that the facts did not require the broad statements that were made. The facts were these: Taylor, the complainant's father, originally owned the

entire water front of Newport, Kentucky. In 1794, he established a ferry under license from State authority, giving him exclusive ferry rights for the distance covered by his own lands. In 1795, he replatted his lands, conveying to the city the water front as a common, but reserving "every advantage and privilege which he has not disposed of, or which he would by law be entitled to." This reservation would include the right to a ferry landing, and the attempted grant by any authority of such a landing privilege on the land conveyed by him with such reservation would be an illegal infringement of his rights. The decision of the Court was a vindication of his property rights.

It was said in this case:

> "Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this Court to annul or control them."

This suggestion is noted as significant in the case of *St. Clair County vs. Interstate Transfer Co.*, 192 *U. S.*, 454, where it is said (p. 461) in reviewing the *Conway case:*

> "In conclusion, however, the Court pointed out (p. 634) that undoubtedly if in the grant of a ferry privilege there were contained provisions repugnant to the commerce clause, it would be the duty of the Court to prevent their enforcement."

That such an ordinance as is here in question is a "provision repugnant to the commerce clause" which

"it is the duty of this Court to annul," is distinctly held in the *Covington Bridge case supra* (154 U. S., 204), where the *Conway case* is referred to as follows:

> "The opinion, however, did not pass upon the question of the right of one State to regulate the charge for ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. It is true the States have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several States. But we are not aware of any case in this court where such right has been recognized."

Wiggins Ferry Co. vs. East St. Louis, 107 *U. S.* 365, appears on its face to be very similar to the case at bar, and to the *Gloucester Ferry* case, but it should be observed that the *Wiggins Ferry* case differs from either of these in that the corporation on which the license tax was imposed was incorporated and authorized to do business by the State under whose authority the tax was imposed, and its boats

and property were kept within the State. This was given weight by the Court, when it said (p. 373):

> "The levying of a tax upon vessels or other water craft or the exaction of a license fee by the State within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States."

The distinction here suggested is pointed out in the *Covington Bridge case, supra:*

> "So too, in *Wiggins Ferry Co. vs. East St. Louis*, 107 *U. S.* 365, it was held that a State had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry-keepers living in the State, for boats which they owned and used in conveying from a landing in the State passengers and goods across a navigable river to another State. It was said that 'the levying of a tax upon vessels or other water craft, or the exaction of a license fee by the State within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States.' Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran vs. New Orleans*, 112 *U. S.* 69, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow boats to and from the Gulf of Mexico was void as a regulation of commerce."

The distinction is precisely the same as that between the *Covington Bridge* and *Henderson Bridge* cases, above mentioned. Unless so distinguished, the *Wiggins Ferry* case is inconsistent with the *Glouces-*

ter Ferry case, and must be regarded as overruled by it.

On the other hand:

> "It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a State legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves and soliciting goods and passengers for a return voyage, without first obtaining a license from some State officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of State legislation, but within that of national legislation. *Inman Steamship Co. vs. Tinker*, 94 U. S., 238."
>
> *Crutcher vs. Kentucky*, 141 *U. S.*, 47 (57, 58).

The foregoing was quoted with approval in *Western Union Telegraph Co. vs. Kansas*, 216 *U. S.*, 1 (p. 21), where it was also said, quoting from the same case:

> "We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The *Western Union Telegraph* case also refers approvingly to the *Gloucester Ferry* case.

The ordinance in question violates the treaty between the United States and Great Britain.

The treaty in question is designed "to prevent disputes regarding the use of boundary waters," and "to make provision for the adjustment and settlement of all such questions as may hereafter arise." (Rec., 73.)

In the preliminary article, the boundary waters are defined as "the waters from main shore to main shore of the lakes and rivers or connecting waterways or the portions thereof along which the international boundaries between the United States and the Dominion of Canada passes." (Rec., 73.)

Article 1 provides "that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels and boats of both countries equally, subject, however, to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries."

One of the purposes of navigation is to transport persons and property across these boundary waters, and their free navigation for that purpose is as important as for any other.

Freedom of navigation is not consistent with an

ordinance which forbids either persons or property, and property whether accompanied by the owner or shipped on bills of lading or otherwise, from being transported from the American to the Canadian shore, without permission first obtained from the Mayor of the local municipality.

The ordinance in question authorizes, but does not require, the Mayor to grant such license. He could not be compelled to grant the same to the appellee even if application were made therefor. Freedom of navigation is not consistent with the right on the part of a municipality to grant or withhold a license to engage therein at its discretion, nor with the right of such municipality to impose conditions upon the exercise of such right.

That the language of this Treaty prohibits such regulations as are here sought to be imposed, at least as against citizens or subjects of another nation, is shown by the construction placed by the Supreme Court on the similar language of the Ordinance of 1787:

> "It seems clear, therefore, that according to the construction given by this Court to the clause in the Act of Congress relied upon by the Court below, it does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce."
>
> *Willamette Iron Bridge Co. vs. Hatch*, 125 *U. S.*, 1 (12).

We have here a corporation organized under the authority of a foreign State, engaged in navigating these boundary waters for a lawful purpose and engaged in foreign commerce over them. Under the

license which it has accepted, and under which it has established its ferry, it is required to conform to certain specified conditions. The city of Sault Ste. Marie, Michigan, forbids this company from enjoying its license or engaging in this navigation except with its permission, upon payment of an annual license fee and upon conditions which are inconsistent and in conflict with the terms of the license granted by the Dominion Government in all essential particulars.

We submit that these burdens are an unwarranted interefernce with the foreign commerce in which the appellee is engaged; that they are in direct conflict with the terms of the treaty between the United States and Great Britain, and that they are beyond the power of the municipality to impose.

If local cities, villages and hamlets may forbid foreign citizens and foreign vessels from engaging in navigation upon our boundary waters for the purpose of transporting persons and property between these two countries until permission has been obtained from such local municipalities, upon whatever conditions they may see fit to impose, serious complications may arise. Certainly such international commerce is not free. What would prevent these municipalities from excluding foreign applicants for a license altogether, or by the imposition of discriminating license fees, or different rates of toll, create conditions so unequal as to work a practical exclusion?

Nor is the contention sound that a State may regulate and license ferries for transportation of passengers from its own shore to the shore of another country. If transportation by ferry across a boundary stream is commerce, and is to be free to the vessels of either country, it should be equally so in either direction.

> "The genius and character of the whole government," said Chief Justice Marshall, "seem to be, that its action is to be applied to all external concerns of the nation * * *"
>
> Quoted in *Minnesota Rate Cases, p.* 398.

These considerations and others which readily suggest themselves emphasize the importance of adhering to the rule already laid down by this Court that transportation by ferries is commerce and that the regulation of tolls upon an interstate bridge (and upon ferries which have been held to be practically the same thing) is an interference with interstate commerce.

We submit that when considered with reference to foreign commerce the question

> "is, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected."
>
> *Henderson vs. Mayor of New York, (Supra).*

HENRY E. BODMAN,
Attorney for Appellee.

ALEXIS C. ANGELL,
HERBERT E. BOYNTON,
JAMES TURNER,
Of Counsel.